

# State of Colorado



**Bill Owens**  
*Governor*

**John Zakhem**  
*Board Chair*

**Kristin F. Rozansky**  
*Board Director*

**State Personnel Board**  
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## **AGENDA PUBLIC BOARD MEETING June 20, 2006**

A public meeting of the State Personnel Board will be held on **Tuesday, June 20, 2006, at the Colorado State Personnel Board, 633 17<sup>th</sup> Street, Suite 1400, Courtroom 1, Denver, Colorado 80202-3604.** The public meeting will commence at 9:00 a.m.

Reasonable accommodation will be provided **upon request** for persons with disabilities. If you are a person with a disability who requires an accommodation to participate in this meeting, please notify Board staff at 303-866-3300 by June 14, 2006.

### **I. REQUESTS FOR RESIDENCY WAIVERS**

#### **A. June 1, 2006 Report on Residency Waivers**

Reports are informational only; no action is required.

### **II. PENDING MATTERS**

#### **A. Petitions for Declaratory Order**

1. Petition for Declaratory Order of the Colorado Federation of Public Employees (CFPE) v. Department of Personnel and Administration, State Personnel Board case number 2006D003.

On February 8, 2006, CFPE filed a petition for declaratory order asking that the State Personnel Board act immediately to provide an interpretation of the law and guidance in the following areas, which CFPE asserts are within the Board's full jurisdiction and which were previously covered by the Director's Procedures: Director's Procedure 4-24 - Referrals for Multiple Vacancies, Director's Procedures 4-31 - Temporaries, and Procedures 10-3(F) and 10-5 - Personal Services Contracts.

On April 4, 2006, CFPE filed a Supplement to its Petition for Declaratory Order, reiterating its request that the Board provide interpretive guidance on DPA procedures 4-24 and 4-31.

### **III. REVIEW OF INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR ON APPEAL TO THE STATE PERSONNEL BOARD**

- A. Terry Miller v. Department of Higher Education, Board of Trustees, University of Northern Colorado, State Personnel Board case number 2005B112.

Complainant, a Pipe and Mechanical Trades II, appealed his disciplinary demotion, seeking reinstatement, back pay, benefits, and attorney fees and costs. After hearing, the ALJ found, among other things, that Complainant failed to perform at the level required of his position, was unable to follow his supervisor's directions, and was unable to maintain the focus necessary to complete tasks in a timely manner, despite the fact that his supervisor worked hard to help him improve. The ALJ ruled that the appointing authority exercised his decision with moderation, and thus, Respondent's actions were not arbitrary, capricious, or contrary to rule or law, and were within the range of reasonable alternatives. No attorney fees were awarded, as the ALJ affirmed Respondent's demotion of Complainant.

On November 14, 2005, the ALJ issued the Initial Decision of the Administrative Law Judge. Complainant filed his Notice of Appeal on December 14, 2005, and his Opening Brief on March 20, 2006. Upon the parties' discovery of an incomplete transcript, a Supplemental Certificate of Record of Administrative Proceeding Before the State Personnel Board was issued on April 13, 2006. Complainant then filed Complainant's Amended Opening Brief on May 12, 2006. On June 1, 2006, Respondent's Answer Brief was filed.

- B. Patrick Ward v. Department of Natural Resources, Division of Wildlife, State Personnel Board case number 2004B143.

Complainant, a Wildlife Technician III, appealed his administrative termination from his position, alleging discrimination based on disability. After hearing, the ALJ determined that Respondent discriminated against Complainant on the basis of his disability in violation of the Colorado Anti-Discrimination Act with a threefold finding: (1) Complainant is disabled within the meaning of the Act; (2) Respondent violated its duty to reasonably accommodate Complainant's disability in two ways: first, by failing to engage in the interactive process, and second, by failing to timely conduct a vacant job search; and (3) Complainant is unable to perform the essential functions of the Wildlife Technician III position with or without accommodation. In addition, the ALJ concluded that Respondent violated its own "Return to Work/Modified Duty Policy" and Board Rules pertaining to the Americans with Disabilities Act coordinator, and its action was arbitrary and capricious. The ALJ rescinded Respondent's termination of Complainant and ordered that Complainant is reinstated with full back pay and benefits to the date of termination. The ALJ's order stated that, because Complainant was not able to perform the essential functions of his position with or without reasonable accommodation at the time of his termination from DNR, Respondent and Complainant are ordered to engage in the interactive process of reasonably accommodating him in a vacant position for a six-month period during which time he shall continue to receive front pay consisting of his full pay and benefits. Finally, the ALJ awarded Complainant reasonable attorney fees and costs.

On February 2, 2006, the ALJ issued the Initial Decision of the Administrative Law Judge. On February 28, 2006, Respondent filed its Notice of Appeal, and, on May 4, 2006, Respondent's Opening Brief on Appeal from the Initial Decision of the Administrative Law Judge. Complainant's Answer Brief was filed on May 15, 2006, and Complainant's Addendum to Ward's Answer Brief was filed on May 17, 2006. On May 26, 2006, Respondent's Reply Brief was filed.

#### **IV. REVIEW OF PRELIMINARY RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR TO GRANT OR DENY PETITIONS FOR HEARING**

- A. Nancy Resnick v. Department of Human Services, Colorado Mental Health Institute at

Fort Logan, State Personnel Board case number 2005G021.

Complainant was a probationary employee who was terminated from employment at Colorado Mental Health Institute at Fort Logan, Department of Human Services. On September 3, 2004, Complainant filed a petition for hearing, asking for Board review of her State Employee Protection Act (Whistleblower) claim of retaliation for disclosure of information.

Respondent argues that Complainant was terminated for unsatisfactory performance and not in retaliation for disclosure of information.

On May 10, 2006, the Administrative Law Judge issued a Preliminary Recommendation, recommending that Complainant's petition for hearing be denied.

B. Sean McGuire v. Department of Revenue, State Personnel Board case number 2004G080(C).

Complainant, a Revenue Agent, filed several petitions for hearing beginning on February 19, 2004, arguing that he was denied relief in a Step II grievance decision because his promotion to Revenue Agent II was delayed; he was denied a promotion to Criminal Investigator II; he has been discriminated against on the basis of gender, age, and disability; and Respondent has retaliated against him for filing previous grievances.

Respondent argues that Complainant has not specified any acts on the part of the appointing authority that are arbitrary, capricious, or contrary to rule or law; he has failed to establish a *prima facie* case of discrimination; he does not specify how the hiring of another individual was discriminatory; he has not listed any witnesses that will testify that they had personal or other knowledge of illegal discrimination directed at Complainant; and he has not produced any documentary evidence that would support an inference of illegal discrimination or retaliation. In addition, Respondent argues, the evidence shows that Complainant has suffered no employment decisions that negatively affected his pay, status or tenure; therefore, there are no issues that merit a full evidentiary hearing.

On May 10, 2006, the Administrative Law Judge issued a Preliminary Recommendation, recommending that Complainant's petition for hearing be denied.

C. Simone Belmonte v. Department of Corrections, Training Academy, State Personnel Board case number 2005G101.

Complainant was a probationary employee who was terminated from employment while he was attending Respondent's training academy. The stated grounds for his termination were that he had failed to disclose a number of arrests or other law enforcement contacts during the application process. Complainant argues that his termination was arbitrary and capricious because he did not fail to disclose information and that he had obtained a law enforcement records check from the Chafee County Sheriff's Office and submitted it to Respondent. Additionally, Complainant argues that Department of Corrections regulations do not require that Complainant be terminated under these circumstances, and that Respondent's decision to terminate Complainant, even without determining the dispositions of the charges, contravenes departmental regulations and is arbitrary and capricious.

Respondent argues that Complainant is unable to challenge his dismissal for cause, given that he was a probationary employee at the time of his termination.

On June 8, 2006, the Administrative Law Judge issued a Preliminary Recommendation that the Complainant's petition for hearing be denied.

**V. INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR**

- A. William Thomas Little v. Department of Corrections, State Personnel Board case number 2006B013 (May 25, 2006).

Complainant, a correctional officer, appealed Respondent's rejection of his withdrawal of resignation, asserting that he was constructively discharged. After hearing, the ALJ found that the Negotiated Resignation into which Complainant had entered with Respondent was ambiguous, although Complainant did intend to resign when he signed the document; Respondent violated Board Rule 7-5B in rejecting Complainant's timely withdrawal of his resignation; Complainant did not knowingly and voluntarily forfeit his right to appeal his resignation; Complainant was, in fact, constructively discharged; Complainant is entitled to a hearing to challenge the basis for his termination; and Complainant is not entitled to an award of attorney fees and costs. In her decision, the ALJ ordered that Respondent accept Complainant's withdrawal of resignation, and that the termination letter issued to Complainant be given full force and effect, both retroactive to August 5, 2005.

- B. Pamela Cress v. Department of Human Services, State Personnel Board case number 2005S012 (May 30, 2006).

Complainant appealed her non-selection for an Accounting Technician II position by Respondent, requesting appointment to that position or a comparable position with comparable pay or better. After hearing, the ALJ determined that it is reasonable for a departmental Human Resources (HR) Director to determine that it is poor HR practice to hire a former employee terminated for disciplinary reasons, and, in addition, it is an appropriate HR practice to assure that prior to making a hiring decision, the appointing authority is given all relevant information necessary to make a fully informed judgment. The ALJ found that Respondent did not violate Board Rules or Director's Procedures in the selection process, that Respondent was not arbitrary and capricious in not selecting Complainant for the position, and that Respondent did not retaliate against Complainant in its decision. The ALJ affirmed Respondent's non-selection of Complainant for the Accounting Technician II position and dismissed the case with prejudice.

- C. Betty Shea v. Department of Human Services, Division of Youth Corrections, Spring Creek Youth Service Center, State Personnel Board case number 2006B039 (May 31, 2006).

Complainant, a correctional officer (SSOI), appealed her termination by Respondent, seeking reinstatement, back pay and benefits, and an award of attorney fees. After hearing, the ALJ rescinded the termination and reinstated Complainant to her position with full back pay and benefits, finding that Complainant committed the acts for which she was disciplined; Respondent's disciplinary action was arbitrary, capricious or contrary to rule or law; the discipline imposed was not within the range of reasonable alternatives; and attorney fees are warranted. In the ALJ's analysis, Respondent's evaluation of Complainant's responsibility for the care of the resident in question called for an unreasonable interpretation of the facility rules and did not account for the fact that Complainant was only asked to provide her advice to another SSOI employee and then went off duty, while the matter was handled by two other SSOIs, a counselor, and a mental health therapist at the facility. The ALJ also found that termination from employment under the circumstances of this case, and for an employee with the performance history of Complainant, was excessive and not within the reasonable range of alternatives, even if one assumed that there had been rule violations in this case. Finally, the ALJ held that termination under the circumstances of this case constituted a groundless personnel action and warranted the award of attorney fees to Complainant.

- D. Timothy Bennett v. Department of Corrections, State Personnel Board case number 2003B150(C) (June 1, 2006).

Complainant, a Life/Safety officer, appealed the abolishment of his position and subsequent retention rights, and asserted a claim of age discrimination. Complainant also appealed a disciplinary action which had resulted in the assessment of a \$300 per month permanent base pay reduction. Complainant additionally grieved a number of events, including a corrective action, a decision to place him on administrative leave while there was an investigation into whether he had improperly taken state property from the facility, a detention at the facility after he and his wife entered the grounds while he was on administrative suspension, and a "needs improvement" performance review. Complainant also filed a whistleblower complaint associated with a number of his grievances. After hearing, the ALJ found that Respondent's layoff procedure was contrary to rule or law in that it failed to apply Board rules requiring that the agency use time bands to determine seniority of employees and that employees in the more junior time bands are to be laid off first. The ALJ found nothing arbitrary, capricious or contrary to rule or law in the procedure Respondent had used to determine Complainant's retention rights. The ALJ rejected Complainant's age discrimination claim on the grounds that Complainant's replacement by a man six months his junior did not constitute a *prima facie* case of age discrimination as a matter of law, that there was no persuasive evidence that age played a role in Respondent's decision-making, and that Complainant presented insufficient evidence of a disparate impact on the basis of age. As for the disciplinary action, the ALJ found that Complainant had committed three of the four asserted acts, but that a permanent base pay reduction constituted punishment without end, which quickly leads to a disproportionate punishment for the violations. The ALJ reduced the penalty to \$300 per month for six months. The ALJ found that, with one exception, Complainant had failed to show that any of the actions he grieved constituted actions which were arbitrary, capricious, or contrary to rule or law, and that he did not sufficiently demonstrate that any of the actions alleged were retaliatory for any disclosures that he had made. The ALJ found that a reference to the violation of a DOC regulation on misstatements was not founded on any of the behavior addressed in the corrective action, and that reference should be removed from the corrective action. Finally, the ALJ found that Respondent's interpretation of the Board's layoff rules so that Respondent had eliminated the fundamental protection of seniority for state employees constituted a sufficiently strained and unreasonable interpretation of the Board rules and case law as to fall into the category of a bad faith interpretation of the rules. The ALJ awarded attorney fees and costs for the litigation of the abolishment issue, and rejected Respondent's request for an award of fees and costs against Complainant.

## **VI. REVIEW OF THE MINUTES FROM THE MAY 16, 2006 PUBLIC MEETING OF THE STATE PERSONNEL BOARD**

## **VII. ACKNOWLEDGMENTS**

### **DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS MAY 16, 2006 PUBLIC MEETING:**

- A. Dan Wells and Barry Rice v. Department of Higher Education, University of Colorado at Denver, Auraria Media Center, Auraria Library and Auraria Higher Education Center, State Personnel Board case number 2002B092(C).

In response to a Mandate/Order affirmed in Part, Reversed in Part and Remanded the Case with Directions from the Court of Appeals, the Board voted to enter an order reinstating the Administrative Law Judge's order regarding Rice, adopting the findings of fact and conclusions of law in the Initial Decision of the Administrative Law Judge, in conformance with the order from the Court of Appeals.

- B. Petition for Declaratory Order of Barry Rice v. Department of Higher Education, University of Colorado at Denver, Auraria Media Center and Auraria Higher Education Center, State Personnel Board case number 2006D002.

The Board voted to deny the petition for declaratory order based on jurisdictional grounds.

- C. Patricia Jones v. Department of Corrections, State Personnel Board case number 2003B165.

The Board voted that, with regard to Complainant's Motion to Strike Certain Arguments and Attachments in Respondent's Reply Brief or Strike Brief in its Entirety, Complainant's request to strike Attachment 1, 2003 Layoff Process Audit: Department of Corrections, Final Report, Issued April 2006, is granted; and the remaining requests to strike the arguments on Finding #78 and Attachment 4 are denied. Complainant's Motion to Allow Sur Reply is denied as untimely. Board Rule 8-72B(A). Respondent's Motion to Strike Complainant's Sur Reply and Accompanying Motions as Untimely is rendered moot by the denial of Complainant's Motion to Allow Sur Reply. The Board also voted to adopt the findings of fact and conclusions of law in the Initial Decision of the Administrative Law Judge and to adopt the Initial Decision.

- D. Leo Bellio v. Department of Revenue, Liquor & Tobacco Enforcement Division, State Personnel Board case number 2005B052(C).

The Board voted to adopt the findings of fact and conclusions of law in the Initial Decision of the Administrative Law Judge and to adopt the Initial Decision.

- E. Timothy Kosak v. Department of Transportation, State Personnel Board case number 2005G105.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and grant the petition for hearing.

- F. Cynthia A. Hernandez v. Department of Revenue, Colorado State Lottery, State Personnel Board case number 2006G047.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and grant the petition for hearing.

- G. Ronnie Gail Clay v. Department of Corrections, Limon Correctional Facility, State Personnel Board case number 2006G046.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and grant the petition for hearing.

## **VIII. REPORT OF THE STATE PERSONNEL DIRECTOR**

## **IX. ADMINISTRATIVE MATTERS & COMMENTS**

### **A. ADMINISTRATIVE MATTERS**

- Cases on Appeal to the Board and to Appellate Courts
- Order Affirmed in Cookson v. Department of Transportation, State Personnel Board case number 2003G139, Court of Appeals number 05CA1031

- B. OTHER BOARD BUSINESS
    - Staff Activities
  - C. GENERAL COMMENTS FROM ATTORNEYS, EMPLOYEE ORGANIZATIONS, PERSONNEL ADMINISTRATORS, AND THE PUBLIC
- X. PROPOSED LEGISLATION AND/OR RULEMAKING
- XI. EXECUTIVE SESSION
- A. Case Status Report
  - B. Minutes of the May 16, 2006 Executive Session
  - C. Other Business

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**NEXT REGULARLY SCHEDULED BOARD MEETINGS - 9:00 a.m.**

<b>July 18, 2006</b>	<b>Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604</b>
<b>August 15, 2006</b>	<b>Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604</b>
<b>September 19, 2006</b>	<b>Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604</b>
<b>October 17, 2006</b>	<b>Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604</b>
<b>November 21, 2006</b>	<b>Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604</b>
<b>December 19, 2006</b>	<b>Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604</b>